IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.09.2007

CORAM:

THE HONOURABLE MR.JUSTICE D.MURUGESAN
and
THE HONOURABLE MR.JUSTICE K.N.BASHA

Criminal Appeal No.740 of 2007

State by
Deputy Supdt. Of Police,
'Q' Branch CID,
Dharmapuri. ... Appellant /Complainant

Vs.

Sundaramoorthy ... Respondent/Accused

Prayer : Criminal Appeal filed under Section 49 r/w 34 of Act, 2002 to set aside the order passed by the learned Special Judge for POTA Cases, Poonamallee at Chennai dated 9.8.07 in Crl.M.P.No.311 of 07 rejecting the police custody for 10 days and grant permission for 10 days police custody of the accused.

For Appellant : Mr.P.Venkatasubramaniam,
Special Public Prosecutor
for Cases

For Respondent : Mr.R.Sankara Subbu

J U D G M E N T

(Judgment of the court was delivered by D.MURUGESAN, J.)

The appellant, the State represented by the Deputy Superintendent of Police, Q Branch, CBI, Dharmapuri, has approached this Court questioning the order passed in Crl.M.P.No.311 of 2007 in Spl.C.C.No.5 of 2003 in Split up Special C.C.No.1 of 2006 on the file of the learned Special Judge for Cases, Chennai at Poonamalleee.

2. The appellant had approached the Special Court seeking for police custody of the respondent by name Sundaramoorthy on the ground that he might have connection with the other absconding accused, viz., Navin @ Prasath, Chandra, wife of the accused and one Bharathi, who, according to the appellant, belong to Extremists and Terrorist Group and the respondent might have known the hiding places of the other three accused and the places where arms, ammunitions and explosives were hidden. The said application was dismissed by the Special Judge, as stated earlier. Hence, the present appeal is filed by the State.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

3. The circumstances under which the appeal came to be filed may briefly to be stated as follows :

(i) On an information from one police constable attached to District Special Branch, Dharmapuri, on 23.11.2002 regarding ten persons including three women were attending Karate practice for three days in a mango grove owned by one Murugesan of Salihjogipatti Village, a team headed by the Inspector of Police, Naxalite Special Duty Wing, Dharmapuri, conducted a search in the said mango grove and on enquiry of the villagers, the Inspector of Police came to know that those persons already left the mango grove because of objections raised by the local villagers. Subsequently, on the same day, the owner of the mango grove, viz., Murugesan was interrogated and the enquiry revealed that the land belonging to his wife was leased out to one Gurusamy, who had in turn, permitted those ten persons to conduct training. On 24.11.2002, a search was conducted by the Inspector of Police in a Thatched hut owned by the said Gurusamy which lead to seizure of arms and explosive substances. Thereafter, one Martin Tamilselvan and Murugesan were arrested and were remanded to judicial custody in connection with the Uthangarai Police Crime No.1004 of 2002 under Sections 120-B r/w 25 of Arms Act, 4 and 5 of Explosive Substances Act. The said Murugesan was also added as an accused. Again on the same day at about 11.30 a.m., on information that about 25 persons were moving suspiciously with shoulder bags and fire arms towards Kallur village, the Inspector of Police searched in and around Periya Kanagampatti Village which resulted in an encounter at 1.45 p.m. between the group in which one Siva @ Partheeban died of bullet injury and four police personnel including Inspector Ekanthan sustained bullet injuries. Two another accused persons, viz., Mathiyan and Suresh were arrested and the remaining accused flood away from the scene of occurrence. Subsequently one Raja and Kumar @ Venkatesan @ Palamisamy were arrested by the police attached to Uthangarai Police Station in Crime No.1005 of 2002 for various offences including the offences under the Arms Act and Explosive Substance Act. After the occurrence on 24.11.2002, some of the accused, viz., Balan, Duraisingavel, Sundaramoorthy, Vijaya @ Ramani, Chandra, Bharathi and Yasodha ran away from the Chinnakanagampatti village, where they were encountered. Based upon further information, on 25.11.2002, the police was arrested one of the accused, viz., Balan. Still, four accused by name Navin @ Prasath @ Prasanth, Sundaramoorhty, Chandra and Bharathi were absconding.

(ii) On completion of the investigation, the charge sheet was filed on 19.05.2003 against all the accused including the respondent herein and the same was taken cognizance by the Special Judge for Cases in Special C.C.No.5 of 2003. As four accused were absconding, the case was split up and was numbered as Split Special C.C.No.1 of 2006. As the respondent was also absconding, Non-Bailable Warrant was issued by the learned Special Judge as early as in the year 2004 and the respondent was arrested on 09.07.2007 and was produced before the learned Special Judge on 11.07.2007 and the learned Special Judge remanded the respondent till 06.08.2007.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(iii) In view of the arrest and remand, the Investigating Officer filed an application on 25.07.2007 under Section 167 (2) of Cr.P.C. and Section 49 of the Prevention of Terrorism Act, 2002, (hereinafter referred to as "POTA") seeking for police custody. As already referred, the said application was filed with the specific allegations made in paragraph 14 of the affidavit, viz., that the respondent, Sundaramoorthy might have connection with the other absconding accused, viz., Navin @ Prasath, Chandra wife of the accused and one Bharathi, who were also extremists and terrorist. The accused might have known the hiding places of other three accused and the places where arms and ammunition, explosives were hidden.

(iv) The said application preferred by the State was rejected primarily on three grounds, viz., (i) inasmuch as the final report was filed, the application under Section 167 (2) of Cr.P.C. seeking for police custody is not maintainable, (ii) the petition under Section 167 (2) Cr.P.C. ought to have been filed within a period of 15 days from the date of remand and the date of remand of the respondent is 11.07.2007 and that the application was filed for police custody only on 25.07.2007 within a period of 15 days. But though the prosecution is entitled to file an application for further investigation within a period of 30 days, has not filed any application for further investigation within the stipulated period and (iii) even if such an application is maintainable in terms of Rule 76 of the Criminal Rules of Practice which describes that grant of police custody is not automatic as, for such custody, the Court must be satisfied with sufficient materials. Except pleading that the other accused are absconding and their whereabouts are not known and that the accused might have knowledge about their whereabouts and the concealment of the arms and ammunition, there were no other materials to satisfy the Court to grant police custody.

4. By the order under appeal, the learned Special Judge had accepted the contentions raised by the respondent and thereby rejected the petition for police custody.

5. Mr.P.Venkatasubramaniam, learned Special Public Prosecutor for POTA Cases submitted that in so far as the respondent is concerned, though the final report was filed, in view of the fact that further investigation is necessary for the purpose of not only securing the other three accused who are absconding but also to find out the arms and ammunitions concealed by the accused. Even though the final report is filed, that will not disentitle the police, the investigating machinery, to cause a further investigation under Section 173 (8) of Cr.P.C. He would further submit that the investigating machinery is obligated only to intimate the concerned Court as to their desire to reinvestigate the case so as to enable the investigating agency to cause further investigation and such intimation was in fact made to the concerned Court and therefore, it cannot be considered that the investigation was over in so far as the respondent is concerned, the moment the final report was filed. He would also submit that Section 49 of the POTA contemplates that an application under Section 167 (2) Cr.P.C. could be made within a period of 30 days, in case the accused is implicated for the offences under the POTA. Hence, an application having been filed within a period of 15 days and the intimation for further investigation was made within a period of 30 days,

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

the learned Judge ought to have ordered the police custody. Insofar as, the finding of the learned Judge to the Rule 76 of the Criminal Rules of Practice, it is only procedural and mere procedural aspect will not take away the substantive right for further investigation. Therefore, he would submit that securing or collecting information from the respondents in respect of the other accused as well as the concealment of the arms, ammunitions shall form part and parcel of investigation. For the said reasons, the police custody is necessary.

6. On the other hand, Mr.R.Sankara Subbu, learned counsel for the respondent submitted that once the final report is filed after completion of the investigation, unless a specific request in the form of an application for further investigation is made, the investigating agency has no right to ask for police custody. In support of the said submission, the learned counsel would draw our attention to Section 309 of Cr.P.C. which contemplates the remand after the investigation is over and the final report is filed. He would also submit that under Section 1(6) (d) of POTA, the appellant could avail the benefit of the said provision only in case where investigation is pending. Once the investigation is over, the appellant cannot seek police custody either under Section 167 (2) of Cr.P.C. or under Section 49 of the POTA, more particularly, the POTA expired as on 21.09.2004, when the application for police custody was filed. Lastly, the learned counsel submit that in the teeth of Rule 76 of the Criminal Rules of Practice, it is the duty of the investigating agency to satisfy the Court as to the reasons for which such police custody is sought for. It is not as if whenever such application is made, it is automatically be granted even without any supporting materials.

7. We have carefully considered the above submissions.

8. In so far as the issue relating to whether investigation was pending as on date when the application for police custody was made, we must refer the concerned provisions of Section 167 of Cr.P.C.

> 167. Procedure when investigation cannot be completed in twenty-four hours
>
> (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.
>
> 2. The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

a term not exceeding fifteen days in the whole ; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, -

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years ;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter ;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him ;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

(2-A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2) :

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under the Section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his Order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

9. Section 167 (2) of Cr.P.C. contemplates that the Magistrate concerned could make an order of remand initially for a period of 15 days. Section 167 (5) of Cr.P.C. contemplates that if in any case triable by the Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date the accused was arrested, the Magistrate, for the special reasons and in the interest of justice satisfies himself that the continuation of investigation beyond the period is necessary, can order further investigation. Likewise, under Section 167 (6) of Cr.P.C., the Sessions Judge may, if he is satisfied on an application made to him or otherwise that further investigation ought to be made, vacate the order made under sub-Section (5) under Section 167 of Cr.P.C. From the reading of the above provisions, the investigation should be completed within a period of 60 days or 90 days, as the case may be, as contemplated under Section 167(2)(a) of Cr.P.C., but the period can

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

be extended only by specific orders of the Magistrate and the Sessions Judge as well.

10. Section 173(2) of Cr.P.C. contemplates filing report on completion of the investigation. In this context, we may refer to Section 173(8) of Cr.P.C., which reads as follows :

> "173. Report of police officer on completion of investigation -
> (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provision of sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

From the above Section, it is seen that the Investigating Officer is not prevented from causing further investigation in respect of the offence after a report under Sub-Section 2 had been forwarded to the Magistrate and in the event of upon such investigation, the Officer in-charge of the police station obtained further evidence, oral or documentary, he shall forward further report regarding such evidence in the form prescribed and a further report is contemplated only when further investigation was made after the first final report was filed. If Section 173(8) Cr.P.C. read along with Sub-Sections 1, 2 and 5 of Section 167, it is clear that unless there is specific order from the Court for further investigation, there cannot be any further investigation and consequentially no further final report could be filed.

11. The Contention of the learned Special Public Prosecutor is that in terms of Section 173 (8) of Cr.P.C., a further investigation is available to the investigating agency and therefore, for the purpose of such investigation police custody ought to have ordered. In support of the said submission, the learned Special Public Prosecutor would rely upon the following judgments :

1) Ramlal Narang Vs. State (1979 SCC (Cri.) 479)
2) State of Rajasthan v. Aruna Devi and others (1995 SCC (Cri.) 1) ;
3) Kari Choudary V. Sita Devi (2002 SCC (Cri) 269) ;

12. There is no quarrel as to the power of the investigating machinery to cause further investigation in deserving cases. However, the question is as to when such further investigation could caused. It is not as if the investigating agency after filing the final report could suo motu investigate and collect the materials to file a further report. Even if, for the sake of argument, it is accepted that a further investigation can be made without any specific direction, unless there is specific order for such investigation, the investigating agency cannot file the final report and such investigation could be only a formality. In that context, the permission from the Court for further investigation and remand is

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

important.

13. As far as the factual aspect in this case is concerned, the respondent was arrested on 09.07.2007 and he remanded to custody on 11.07.2007. The remand was made till 06.08.2007. Our attention is not drawn to the fact that such an application was moved before the learned Special Judge seeking for further investigation when the respondent was produced for remand on 11.07.2007. As admittedly, the application for police custody was made on 25.07.2007 even till date admittedly, there was no application for seeking for further investigation filed. A faint attempt was made by the learned Special Public Prosecutor that giving an intimation to the Magistrate as to the intention of the investigating agency for further investigation would be sufficient and such intimation was in fact given and therefore, merely because a specific application was not made, that will not disentitle the police, investigating agency, to cause further investigation and consequentially ask the judicial custody of the accused. It is a factual aspect and we will have to go by the finding of the learned Judge. In this aspect, it is the specific finding of the learned Judge that even on the date when the application for police custody was made, there was no such intimation and such intimation was made after the said application was filed. If that is taken as true and in fact the said finding has not been contraverted, even on that date when the application for police custody was made, there was not even intimation to the Court as to the intention of the Investigating agency to cause further investigation in this case.

14. For the above reasons, we hold that the application filed under Section 167 (2) Cr.P.C. was made not while the investigation was pending and in fact it was filed after the investigation was over and the final report was filed and such application is not maintainable. It is to be further noted that though the final report was initially filed against all the accused, as four accused were absconding, the case came to be split up and was renumbered and for legal purposes trial was pending and it could not be proceeded for want of all the accused.

15. Before considering the second submission it would be appropriate to consider the last submission viz., whether the application for police custody has to be granted automatically or any order passed for such police custody should be supported by materials. The police custody is concerned about the infringement of right of an individual, more particularly fundamental right guaranteed under Article 21 of the Constitution of India. There are certain exceptions by way reasonable restrictions and one such restriction is the grant of police custody while investigation is pending. Therefore, any application for grant of police custody must be strictly considered on materials as it involves the fundamental right and personal liberty of an individual. The provisions are to be strictly understood and complied with. When an application for police custody is contemplated within a period of 15 days on the initial remand, such an application for police custody ought to have been made only during the period of initial remand and when the investigation was pending. As we have held on the facts of this case that the investigation was already over and final report also filed and the case was split up and in the absence of any application for further investigation for the

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

purpose of the respondent, the investigation is completed, we are of the considered view that the application if entertained would amount to infringement of the fundamental right guaranteed under Article 21 of the Constitution of India. Even going by the averments made in the affidavit in support of the petition for police custody, we could only see para 14 of the affidavit in which, the reasons are stated to be on two fold. Firstly, it is the apprehension of the investigating agency that the respondent might have connection with the other three absconding accused. Secondly, that the respondent might have known the hiding places of three accused and places where arms, ammunitions and explosives were hidden.

16. Prima facie we are of the considered view that the above averments do not constitute sufficient materials to sustain a petition for police custody. In the teeth of Rule 76 of the Criminal Rules of Practice, as rightly contended by the learned counsel for the respondent, the order for police custody cannot be made just for the sake of asking but only when in the opinion of the Court that such an order for police custody is necessary for effective completion of the investigation. As we have factually found that the materials are totally insufficient and cannot be the basis for ordering the police custody, we find no infirmity in the findings in the order passed by the learned special Judge for Cases, Poonamallee at Chennai.

17. As we have held the issues No.1 and 3 against the State and in favour of the respondent, any decision in respect of the second issue is of no consequence and purely academic. Therefore, we refrain the discussion on the said issue.

18. For all the reasons stated above, the appeal fails and the same is dismissed.

gg

sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Special Judge for Cases, Poonamalle at Chennai.

2. - do - Thro' The Sessions Judge, Chennai.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

3. The Superintendent of Police, "Q" Branch, Dharmapuri

4. The Deputy Superintendent of Police,
   "Q" Branch, CID, Dharmapuri.

5. The District Collector, Chennai District.

6. The Director General of Police, Chennai.

7. The Public Prosecutor,
   Madras High Court, Madras.

+ 1 cc to Mr.R.Sankara Subbu Advocate SR.NO.56875

LA(CO)
3.10.07

HIGH COURT OF JUDICATURE MADRAS
सत्यमेव जयते
WEB COPY

https://hcservices.ecourts.gov.in/hcservices/